BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID OLD Claimant	)	
VS.	)	
J.G. LAWRENCE, INC. Respondent	)	Docket No. **1,035,225**
AND	)	
TRAVELERS INDEMNITY CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the December 10, 2008 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 20, 2008.

APPEARANCES

Timothy G. Riling, of Lawrence, Kansas, appeared for the claimant. Shelly E. Naughtin, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties stipulated that claimant suffered an 11 percent whole person functional impairment. And the parties further agreed that there was a calculation error in the Award regarding the amount due and owing as of December 5, 2008, based upon the compensation awarded for the 65 percent work disability.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant's average weekly wage was $1,560, and that he suffered a 65 percent work disability based upon a 100 percent

wage loss and a 30 percent task loss. The ALJ also ordered that the bills listed in Exhibit #1 of the claimant's deposition be paid by respondent.

The respondent requests review of the following issues; (1) the claimant's average weekly wage; (2) the nature and extent of claimant's disability, specifically whether claimant is entitled to a work disability; and, (3) whether the bills of a massage therapist should be paid as authorized medical expenses.

Respondent argues that the ALJ's Award should modified to limit claimant's award to the 11 percent functional impairment because he did not make a good faith effort to find employment and a wage within 90 percent of his pre-injury average weekly wage should be imputed. Respondent also argues that the claimant failed to meet his burden of proof to establish his average weekly wage. Finally, respondent argues that the bills from a massage therapist should not have been ordered paid as authorized medical expenses.

Claimant argues that the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed that claimant suffered accidental injury arising out of and in the course of his employment on January 14, 2007, when he twice slipped on ice and fell. Claimant injured his right shoulder and back. Treatment included surgery on his right shoulder on July 2, 2007. As previously noted, the parties agree that as a result of his injuries claimant has an 11 percent whole person functional impairment.

Initially, respondent argues that the claimant failed to meet his burden of proof that his average weekly wage was $1,560. Respondent, in its brief and at oral argument, contends claimant's average weekly wage was $800, as stipulated at the prehearing settlement conference. There is some indication in the record that respondent may no longer be in business or that respondent's owner is difficult to locate, nonetheless there was no payroll information available at that hearing as required by K.A.R. 51-3-8(c). Although respondent may have suggested $800 as the average weekly wage at the pre-hearing settlement conference, ultimately there was no agreement or stipulation to that amount by the claimant. And the claimant's average weekly wage was specifically listed as an issue at the regular hearing.[1]

[1] R.H. Trans. at 5.

Claimant was the general manager and a sales representative for respondent. The respondent's business included taxis, limousine services, airport shuttles, buses and charter buses. Claimant ran the daily operations and it was his job to make sure that all of the employees were where they needed to be and that all of the vehicles were kept up. On occasion the claimant would have to pick someone up from the airport.

Claimant's uncontradicted testimony was that at the time of his accidental injuries he was a salaried employee making $1,000 a week, plus $200 a week in commissions. Claimant further testified that he had no retirement benefits or health insurance through respondent. Claimant also testified that for his private and personal use he was given a car ($400 a month), insurance for the car ($200 a month), a cell phone ($100 a month) and an internet connection ($60 a month) at his home. Claimant also testified that respondent paid for his gas ($800 a month).

The calculation of claimant's average gross weekly wage, under certain circumstances, may also include additional compensation the respondent provided claimant.[2] In the determination of what is included as additional compensation, K.S.A. 44-511(a)(2)(D) provides:

> [T]he average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; . . .

However, not every payment made to an employee by an employer constitutes "wages" for purposes of computation of the average weekly wage. The computation does include those payments for work performed to the extent it results in economic gain to the employee.[3]

Based upon claimant's uncontradicted testimony the ALJ determined the claimant's average weekly wage was $1,560. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy and is ordinarily regarded as conclusive.[4] The Board agrees and affirms.

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[2] K.S.A. 44-511(a)(1)(2).

[3] *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

[4] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

Respondent next argues that claimant's compensation should be limited to his functional impairment because he did not make a good faith job search and a wage comparable to his pre-injury average weekly wage should be imputed.

Because claimant has sustained injuries that are not listed in the "scheduled injury" statute, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

The Board has also held workers are required to make a good faith effort to obtain and retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates employment or fails to make a good faith effort to obtain or

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

Claimant did manage to talk to the respondent's owner before his shoulder surgery and was told that he would have a job after he was released from the hospital and had recuperated. But claimant started looking for a job when he couldn't contact the respondent's owner in order to receive his last two paychecks. Claimant had tried to contact respondent's owner several times by several methods and never received a response. Claimant concluded at that point that he wasn't going back to work for respondent.

When claimant was released from treatment in January 2008 he applied for and received unemployment benefits. As part of receiving unemployment benefits he made applications for employment as required. The claimant continued his job search after his unemployment benefits ran out.

At the regular hearing, the claimant provided a list of employers where he had sought employment and he testified that he had applied at an additional 20-30 employers before he was aware he should keep a list. Because claimant felt he had experience in sales, management, driving and logistics, those were the type of jobs he was primarily seeking. Claimant's job search also included internet sites such as career.com, monster.com and jobs.com as well as checking for jobs in the newspaper. In the month after the regular hearing the claimant continued his job search and had filed 15 more applications for employment, called an additional 5 employers and had an interview for a sales position.

Mary Titterington, a vocational consultant, met with the claimant on November 3, 2008, at the request of respondent's attorney. Ms. Titterington identified 28 tasks from the work claimant performed in the 15-year period before his accidental injury. Ms. Titterington also testified that claimant had told her he spent approximately two hours a day, six days a week looking for work. Ms. Titterington opined that an effective job search should take 30 to 35 hours a week. Ms. Titterington noted that claimant was 56-years-old and she agreed that his age and the downturn in the economy would be a factor in obtaining employment as it may take longer to find a job.

Michael Dreiling, a vocational consultant, met with the claimant for a vocational assessment on July 21, 2008, at the request of claimant's attorney. Mr. Dreiling identified 10 tasks that the claimant has performed over the last 15 years. Mr. Dreiling stated that claimant was looking for a job using every available resource. Mr. Dreiling stated that claimant would have difficulty finding a job that would be comparable to what he was doing and earning before the injury.

At the time of the regular hearing and when his deposition was taken approximately one month later on October 17, 2008, the claimant remained unemployed. He detailed his job search and provided a list of the prospective employers he had contacted. And he noted that he had applied for jobs while drawing unemployment benefits. He checked the internet as well as area newspapers for job openings. Claimant's efforts had resulted in two job interviews but unfortunately no job offers at the time of his deposition. Although Ms. Titterington recommended claimant should devote more hours to his job search she never concluded that claimant was not making a good faith job search. The Board finds claimant has satisfied his burden of proof that he has made a good faith effort to find appropriate post-injury employment. Consequently, claimant has a 100 percent wage loss.

Turning to the task loss component of the work disability formula, Dr. Prostic testified that, based on the task list of Michael Dreiling, claimant lost the ability to perform 3 out of 10 tasks for a 30 percent task loss. No other doctor provided a task loss opinion. Consequently, the Board affirms the ALJ's determination that claimant has a 30 percent task loss. And combining and averaging the 100 percent wage loss and the 30 percent task loss results in a 65 percent work disability.

The Board is mindful that Dr. Fevurly opined that the restrictions he imposed were predominantly due to claimant's pre-existing clinical condition and not his work injury. But the doctor's opinion regarding claimant's pre-existing condition was not based upon a review of any medical records. Consequently, Dr. Fevurly's opinion regarding the claimant's restrictions is not persuasive.

Finally, respondent argues that the bills submitted by a massage therapist should not have been ordered paid.

After claimant was injured in his fall he contacted respondent's owner regarding treatment and was told that he could go to a chiropractor. The claimant was then referred to the massage therapist and he notified respondent's owner who approved of that therapy. Claimant testified:

> Q. Okay. Now, are you contending before the Court that this treatment through Ms. Carlton for physical therapy, massage was authorized by Ms. Naughtin's client, J.G. Lawrence, Inc.?
>
> A. Yes, sir.
>
> Q. Why do you maintain that?
>
> A. The doctor that I was authorized to go to when I first got hurt was - - was allowed or authorized by the company and the insurance company, and then he

recommended that I go to her, and so I automatically assumed that since he prescribed it that it was justified and in need.

Q. Who was the owner of J.G?

A. Jerry Grover.

Q. Jerry?

A. Grover.
Q. Is that why it's J.G.?

A. I think so.

Q. And did you make him aware of the fact that you were going to go to Ms. Carlton?

A. Yes, sir.

Q. Okay. And how did you do that?

A. I faxed over the prescription for it, and faxed over the bill for it, and who I was going to, to Jerry Grover.

Q. Okay. And did he approve of that; did he tell you that it was okay?

A. Yeah. He said he talked to the insurance company and everything was okay, just go ahead.[7]

The massage therapist's notes corroborate claimant's testimony in that she indicates she had a prescription referral from claimant's doctor.[8] Consequently, the treatment was authorized and the ALJ's order requiring payment of the bills is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 10, 2008, is affirmed.

IT IS SO ORDERED.

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[7] Old Depo. at 6-7.

[8] Old Depo., Ex. 1.

Dated this _____ day of April 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy G. Riling, Attorney for Claimant
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge